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U.S. Department of Homeland Security  
U. S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

D6

[Redacted]

FILE:

[Redacted]

Office: CALIFORNIA SERVICE CENTER

Date: **MAR 24 2010**

IN RE:

Petitioner:

[Redacted]

Beneficiary:

PETITION: Petition for Alien Fiancé(e) Pursuant to § 101(a)(15)(K) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(K)

ON BEHALF OF PETITIONER:

[Redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The Director, California Service Center, issued a receipt notice for the nonimmigrant visa petition on August 10, 2009, and on December 8, 2009, issued a notice of action indicating that she had reopened the nonimmigrant visa petition or reconsidered the decision previously issued. On December 14, 2009, the director denied the nonimmigrant visa petition. The matter is now on appeal before the Administrative Appeals Office (AAO). The director's decision will be withdrawn and the matter remanded for further action.

The petitioner is a citizen of the United States who seeks to classify the beneficiary, a native and citizen of the Philippines, as the fiancé(e) of a United States citizen pursuant to § 101(a)(15)(K) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(K).

The director denied the nonimmigrant visa petition because the record contains no evidence that the petitioner and the beneficiary personally met within the two-year period immediately preceding the filing of the petition or that the petitioner qualified for a waiver of that requirement.

On appeal, counsel states, in part, that the director's decision was issued in error. Counsel states further that after the director reopened the petition, the petitioner "should have been notified and provided with an opportunity to supplement the support documentation as necessary." Counsel also states that neither a request for evidence (RFE) nor a notice of intent to deny (NOID) was issued.

The regulation at 8 C.F.R. § 103.5(a)(5)(ii) states, in pertinent part:

When a Service officer, on his or her own motion, reopens a Service proceeding or reconsiders a Service decision, and the new decision may be unfavorable to the affected party, the officer shall give the affected party 30 days after service of the motion to submit a brief. The officer may extend the time period for good cause shown. If the affected party does not wish to submit a brief, the affected party may waive the 30-day period.

On appeal, counsel states that the director did not properly issue an RFE or NOID after reopening the petition. Based upon our review of the record, we concur with counsel's statement on appeal. The director did not comply with the regulation at 8 C.F.R. § 103.5(a)(5)(ii) when she reopened the matter because she failed to notify the petitioner that he had 30 days to submit a brief because the new decision may have been unfavorable to him. Accordingly, the director's decision is withdrawn.

Beyond the director's decision, we note that the petitioner submitted his conviction record, which indicates that he was initially charged with rape of a child -3 that was ultimately amended to assault in the second degree, and that the petitioner pled guilty to the second degree assault charge. We also note that the petitioner's conviction record prohibits his contact with B-T-<sup>1</sup>, her place of work, her residence or her school. Other than counsel's statement that the petitioner "shared with [the beneficiary] the circumstances surrounding his 1993 arrest and subsequent conviction," the petitioner has not provided any statement surrounding these events or provided his record of conviction. Therefore, as the AAO is remanding the matter to the director so that she can comply with the regulation at 8 C.F.R. § 103.5(a)(5)(ii), she should request from the petitioner his record of conviction as well as any other

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<sup>1</sup> Name withheld to protect identity.

evidence that she deems necessary,<sup>2</sup> As always, the burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

**ORDER:** The director's decision is withdrawn and the matter remanded for issuance of a RFE and entry of a new decision, which if adverse to the petitioner, should be certified to the AAO for review.

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<sup>2</sup> The record of conviction includes the indictment, judgment, jury instructions, signed guilty plea or transcript of the plea and sentence. *Matter of Silva-Trevino*, 24 I&N Dec. at 699; *Matter of Ajami*, 22 I&N Dec. 949, 950 (BIA 1999).